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Supreme Court, U.S.
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No. 95-1962

In The

Supreme Court of the United States

October Term, 1995

REPUBLICAN PARTY OF ALASKA,

Petitioner,

v.

MIKE O'CALLAGHAN, JED WHITTAKER, ROBERT GIGLER, ALASKAN VOTERS FOR AN OPEN PRIMARY, and STATE OF ALASKA, LIEUTENANT GOVERNOR JACK COGHILL, in his official capacity as Lieutenant Governor,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alaska

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Republican Party of Alaska (RPA) and its members have petitioned this court for a writ of certiorari to review the decision of the Supreme Court of Alaska in *O'Callaghan v. State of Alaska*, 914 P.2d 1250 (Alaska 1996).

This brief is filed pursuant to Rule 15.8 to apprise this Court of what has subsequently taken place in Alaska regarding the 1996 Republican Primary Election, and to demonstrate further why the Petition for Writ of Certiorari should be granted.

REGULATIONS INVOLVED

28 C.F.R. § 51.52 Basic Standard

(a) *Surrogate for the court.* Section 5 provides for submission of a voting change to the Attorney General as an alternative to the seeking of a declaratory judgment from the U.S. District Court for the District of Columbia. Therefore, the Attorney General shall make the same determination that would be made by the court in an action for a declaratory judgment under section 5: Whether the submitted change has the purpose or will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. The burden of proof is on a submitting authority when it submits a change to the Attorney General for preclearance, as it would be if the proposed change were the subject of a declaratory judgment action in the U.S. District Court for the District of Columbia. See *South*

Carolina v. Katzenbach, 383 U.S. 301, 328, 335 (1966).

FURTHER PROCEEDINGS AND REASONS FOR GRANTING PETITION

After this Court denied a motion for stay filed by the Republican Party of Alaska (RPA), the RPA and Wayne Anthony Ross filed a motion for preliminary injunction in *Ross v. State of Alaska, et al.*, United States District Court No. A95-0053-CV (HRH). This motion sought interim implementation of Article XIV, Section 1, of the Rules of the RPA, for the purpose of the August 27, 1996, Alaska Primary Election. District Court Judge H. Russel Holland denied the motion for preliminary injunction by order dated July 17, 1996. (App. 1-15).

Judge Holland concluded that there is a strong likelihood of the RPA's success on the merits of the underlying Constitutional issue of free political association. (App. 6). His order further indicates, however, that the RPA could be bound by the decision in *O'Callaghan v. State of Alaska*, 914 P.2d 1250 (Alaska 1996), as a matter of *res judicata*. (App. 6).

The RPA also filed a motion for partial summary judgment regarding Article XIV, Section 5, of the Rules of the RPA relating to candidate requirements. Judge Holland denied this motion for partial summary judgment on July 31, 1996, holding that the motion was premature, and must ultimately be decided in the course of a decision on the merits of the claims of Wayne Anthony Ross and the RPA with respect to the state law blanket primary requirement. (App. 16-18).

Judge Holland can now be added to the list of judges who agree with the RPA's position on the Alaska blanket primary requirement.

> The court at this juncture believes that the Republican Party of Alaska has a constitutional right to change its mind about the efficacy of a blanket primary, as it did by enacting Rule 1.

Holland Order, July 17, 1996 (App. 14).

Judge Holland, however, is bound by the *res judicata* requirements set forth by this Court in *Allen v. McCurry*, 449 U.S. 90 (1990). Thus, if this Court does not grant the petition for writ of certiorari, Judge Holland may be required to hold that the RPA is bound by the erroneous decision of the Alaska Supreme Court limiting the right of the RPA and its members to free political association. Additionally, guidance from this Court is required for Judge Holland to deal with the other issues in *Ross v. State of Alaska* case, as referenced in the order of July 31, 1996. (App. 16-18).

The RPA tried to protect its right of free political association by attempting to conduct a private mail-in primary election in 1996. On May 28, 1996, the RPA submitted an application for preclearance under the Voting Rights Act to the Civil Rights Division of the United States Department of Justice, and requested expedited consideration on this application. Pursuant to 28 C.F.R. § 51.52(a), the Department of Justice is to determine whether the submitted change has the purpose or will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. The Justice Department waited the full

sixty days to respond to the RPA's application, and then responded by letter requesting a massive amount of additional information. (App. 19-22). An additional sixty days will begin running after the RPA submits these requested materials. The effect of the Department of Justice's response is that the Republican Party will not be able to privately opt out of the Alaska Law Blanket Primary Election in 1996 because of lack of time. In fact, the RPA may very well not be able to obtain a preclearance from the Department of Justice for a private "opt out" at all.

The letter from the Department of Justice indicates that it will be utilizing the *O'Callaghan* decision as part of its preclearance analysis. Unless this court grants the Petition for Writ of Certiorari, the RPA will be in an untenable position. The Department of Justice will deny preclearance because a private "opt out" violates *O'Callaghan*. On the other hand, the District Court will not authorize a private mail-in primary because the Department of Justice has not issued a preclearance, notwithstanding the fact that the District Court believes that the RPA has the Constitutional right to conduct its primary as it sees fit.

In summary, Judge Holland now also has stated that the RPA is correct as a matter of law. Yet, the situation is getting more and more complicated, the RPA and its members have lost their Constitutional right of free political association for the 1996 Alaska Republican Primary Election, and may very well lose their Constitutional right to free political association entirely because of *res judicata*. This Court should protect the RPA's right of free

political association, as well as provide guidance to California, Virginia, and the rest of the nation, by granting the Petition for Writ of Certiorari.

CONCLUSION

The right of free political association of the RPA and its members has been violated for the 1996 primary election, and there will be no remedy. Unless this Court grants the Petition for Writ of certiorari, the RPA may be bound by an erroneous State court interpretation of federal Constitutional law as a matter of *res judicata*, and there may never be a remedy.

The RPA respectfully requests that this Court grant the Petition for Writ of Certiorari, and reverse the decision of the Supreme Court of Alaska.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

WAYNE ANTHONY ROSS, et al., Plaintiffs, vs. STATE OF ALASKA, et al., Defendants.	)	No. A95-0053-CV (HRH)

ORDER

(Filed Jul. 17, 1996)

Motion for Preliminary Injunction

The plaintiffs commenced this action by the filing of a complaint on February 16, 1995.[1] This initial complaint sought a declaratory judgment and injunctive relief in connection with certain rules of the Republican Party. It was belatedly discovered that this initial complaint inadvertently omitted from the prayer for relief reference to Sections 1 and 3 of Article XIV of the Rules of the Republican Party. The court authorized the filing of a second amended complaint[2] to cure this oversight by order filed July 3, 1996.[3]

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[1] Clerk's Docket No. 1.

[2] Clerk's Docket No. 42. A first amended complaint, Clerk's Docket No. 11, contained the same omission as the original complaint.

[3] Clerk's Docket No. 39.

By virtue of this amendment, it is clear that plaintiffs seek declaratory and injunctive relief enforcing a Republican Party rule which provides:

> Only registered Republicans, registered Independents, and those who state no preference of party affiliation shall be allowed to vote in the Republican primary election for Governor, Lieutenant Governor, U.S. Senator, U.S. Representative, and members of the State Legislature.

Republican Party of Alaska, Rules, Art. XIV, § 1.

On July 2, 1996, plaintiffs' motion for a preliminary injunction – seeking interim implementation of Rule 1 for purposes of the upcoming August 27, 1996, Alaska primary election – was filed with this court.[4] The motion is opposed. Oral argument has not been requested by the parties and is not deemed necessary.

The basic historical facts from which plaintiffs' complaint and the instant motion flow are not disputed. Since 1967 the Alaska election code has provided for a single "blanket" primary election in which a voter, regardless of his party registration (if any) might vote as to each or any office on the ballot for any candidate on the ballot, regardless of the candidate's party affiliation (if any).[5] AS 15.25.010, -.060. The principal focus of plaintiffs' concern is that the state's blanket primary procedure permits

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[4] Clerk's Docket No. 38.

[5] Session Laws of Alaska 1967, chapter 1:

An Act. Giving voters the right to vote for candidates without regard to party affiliation in primary elections.

registered Democrats to have a say in who will be the Republican Party nominee for each office on a given ballot. Under the current Republican Party rule, only registered Republicans, registered Independents, and those who have expressed no party preference when registering to vote are invited to participate in the selection of Republican Party candidates for the general election.

Much of the procedural history of the dispute over who should participate in primary elections is set out in both an earlier *O'Callaghan* decision[6] and in the most recent *O'Callaghan* decision.[7] For purposes of this motion, we reiterate a few details. Prior to the *O'Callaghan v. State* decision, the Alaska Republican Party had been invited by the Alaska Supreme Court to intervene in that case. The Republican Party had not been joined in the case and had not itself sought to intervene, although the litigation certainly had potential for affecting the Republican Party, apparently because the state officials were aligned with the party. There was, however, a change of administration in the state of Alaska by the time *O'Callaghan v. State* reached the Alaska Supreme Court, and the state determined to change its legal position on the subject of whether or not the Republican Party rules or the state primary election law should control.

With the change of the state's position, the Republican Party had no advocate before the Alaska Supreme

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[6] *O'Callaghan v. Coghill*, 888 P.2d 1302 (Alaska 1995).

[7] *O'Callaghan v. State*, 914 P.2d 1250 (Alaska 1996).

Court and intervened at the invitation of that court.[8] Before the Alaska Supreme Court, the Republican Party argued that it was entitled to prevail on the extant record as a matter of United States constitutional law as determined by the United States Supreme Court in such cases as *Burdick v. Takushi*, 504 U.S. 428 (1992); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); and *Democratic Party of the United States v. Wisconsin*, 450 U.S. 107 (1981). In the alternative, the Republican Party sought to have the case remanded to the superior court where it hoped to develop a factual record with respect to the plaintiff's right of association under the First Amendment to the United States Constitution.

Applying federal law, the Alaska Supreme Court decided the case on legal issues in favor of the state.[9] The majority of the Alaska Supreme Court, Justice Rabinowitz dissenting, held that:

> Taken individually and collectively these justifications [offered by the state] seem to us to be

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[8] The Republican Party commenced this action at about the same time, and also removed the state court proceeding from the Alaska Supreme Court to this court. In the removed proceedings, this court encouraged the parties to abandon the *O'Callaghan* litigation in favor of proceeding with this case. For reasons which the parties deemed important to them, they decided to proceed with *O'Callaghan*, and the court ultimately remanded that case to the Alaska Supreme Court where the issue under consideration was decided in favor of the state's blanket primary statute. In the meantime, there was no significant activity in this case.

[9] *O'Callaghan v. State*, 914 P.2d at 1261, n.16.

> legitimate and important. Collectively they outweigh the harms to RPA's [Republican Party of Alaska's] associational interests claimed in this case.

O'Callaghan v. State, 914 P.2d 1250, 1262-63 (Alaska 1996). That court ordered that "the 1996 primary be conducted in accordance with Alaska's Statutes. *Id.* at 1263.

With this introduction, the court now turns to the merits of plaintiff's motion for a preliminary injunction.

The parties do not disagree with respect to the standards for granting preliminary injunctive relief. The appropriate standard is set forth in *Native Village of Quinhagak v. United States*, 35 F.3d 388, 392 (9th Cir. 1994), and *Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1389 (9th Cir. 1988). Simply put:

> Where a party can show a strong chance of success on the merits, he need only show a possibility of irreparable harm. Where, on the other hand, a party can show only that serious questions are raised, he must show that the balance of hardships tips sharply in his favor.

Bernard v. Air Line Pilots Ass'n Int'l. AFL-CIO, 873 F.2d 213, 217 (9th Cir. 1989).

Merits of the Case

In order to demonstrate a strong chance of success on the merits of this case, plaintiffs must make two showings: firstly, that there is a strong likelihood that they will convince this court that the party's associational rights are entitled to preference over the state's choice of a blanket primary; and, secondly, that the plaintiffs are not

barred from relitigating that issue by the second *O'Callaghan* decision of the Alaska Supreme Court.

For the reasons and upon the authorities articulated by Justice Rabinowitz in his dissent to the second *O'Callaghan* decision,[10] this court concludes, for purposes of the instant motion, that there is a strong likelihood of plaintiffs' success on the merits of the underlying constitutional issue.

As to the *res judicata* issue, the court is not at all persuaded; and the *res judicata* defense which the state will raise could trump plaintiffs' entire case as to the enforceability of Rule 1 in preference to the state's blanket primary law.[11] The Alaska Supreme Court decided the First Amendment right of association issue which was before it and is before this court on the merits.[12] The matter of whether or not the Alaska Supreme Court has correctly applied federal law does not preclude application of the *res judicata* doctrine.

As discussed above, the issue raised in *O'Callaghan v. State* and here are precisely the same. In each instance, the Republican Party of Alaska asserts that its First Amendment right of association is violated by the Alaska

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[10] *O'Callaghan v. State*, 914 P.2d at 1264.

[11] The state has not yet filed its answer to the plaintiffs' second amended complaint; however, the state's opposition to the motion for preliminary injunction makes it very clear that this defense must be addressed. Opposition to motion for preliminary injunction, Clerk's Docket No. 40 at 13-14.

[12] Plaintiffs raise other issues in this case, but plaintiffs' motion for a preliminary injunction is predicated only upon the conflict between Rule 1 and the state primary election law.

blanket primary law. The Republican Party was before the Alaska Supreme Court and opted to litigate the issue there out of a concern that, were it not present, it would have no opportunity to petition for a writ of *certiorari* for the United States Supreme Court in the event of a loss. Tactically that was probably a proper judgment on the part of plaintiffs, but it carries potential consequences, one of which is that *res judicata* applies to state court determinations of federal constitutional issues. *Allen v. McCurry*, 449 U.S. 90 (1990). This court is not empowered to review decisions of the Alaska Supreme Court. The United States Supreme Court does have that power, and plaintiff Republican Party has petitioned for a writ of *certiorari* and a stay of *O'Callaghan v. State*.[13]

Plaintiff Ross was not a party to *O'Callaghan*. On the briefing presently before the court, the court is unconvinced that issue preclusion will not apply to Ross. His claim of associational rights are, for all practical purposes, identical to those of the Republican Party of Alaska. He asserts the same fundamental right, he challenges the same blanket primary process. The effect upon him of the potential deprivation of rights is only marginally different from that upon the party, of which he is a Republican national committeeman.

In summary, the court concludes for purposes of plaintiffs' motion for a preliminary injunction that this case poses two questions: (1) whether the state's blanket primary unacceptably infringes upon the associational

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[13] The initial stay application was denied. A second stay application has reportedly been denied as well.

rights of the plaintiffs; and (2) whether the doctrine of *res judicata* precludes the plaintiffs from relitigating the first issue. As to the first issue, there is a strong chance that plaintiffs would succeed on the merits. As to the second issue, plaintiffs have raised a serious issue, but have not convinced the court that they have a strong chance of prevailing. Because the second issue has the potential for being determinative of the Rule 1 (blanket primary) dispute in this case, the court is not able to say that the plaintiffs have demonstrated a strong chance of success on the merits. At best, there is a serious question as to whether *res judicata* will bar plaintiffs' efforts to enforce the party's Rule 1. The court now turns to application of the appropriate secondary arm of the standard for granting or denying a preliminary injunction: the balance of hardships.

Balance of Hardships

Because the court has determined that there is not a strong likelihood of plaintiffs' success on the merits of this case, they must demonstrate that the balance of hardships tips sharply in their favor. *Bernard*, 873 F.2d at 217.

The Republican Party contends that it will suffer irreparable harm or, in the alternative, that the balance of hardships tips sharply in the party's favor. The evidentiary support for this contention is problematic. Were the court convinced that the Republican Party had made a strong showing of its chances of succeeding on the

merits, then the affidavit of Deborah Luper[14] might suffice. Under the "likelihood of success" formulation of the standard for granting or denying a preliminary injunction, one need only show the "possibility of irreparable injury". *Native Village of Quinhagak,* 35 F.3d at 392. The Luper affidavit postulates that in a number of Alaska election districts, Democratic Party voters will cross-over and vote for a Republican candidate perceived to be the weakest of several so as to deprive the Republican Party of the opportunity to elect its strongest candidate. The affidavit is speculative, but it might carry the day where only a possibility of irreparable harm need be shown.

When it comes to balancing the hardships, the Luper showing does not stand for much. The affiant states in most conclusory form that she is a political consultant and that she has the requisite personal knowledge and expertise to make the affidavit in question.[15] It is not possible to tell whether the affiant is a formally educated political scientist. The affidavit offers no insight into how the affiant has come to the conclusion that cross-over voting may take place. Perhaps most important, what *may* happen is not very persuasive or weighty when it comes to a balancing of hardships. What may happen also may not happen.

In their reply memorandum, the plaintiffs argue (without any affidavit to support the statements) that there have been numerous instances in the past where cross-over voting has changed the results of elections in

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[14] Clerk's Docket No. 38, Exhibit C.

[15] Clerk's Docket No. 38, Exhibit C, pp. 1-2.

Alaska. The court has a very clear recollection of some of the instances to which the plaintiffs point. As to some of these instances, the court recalls that there was great speculation in the media that cross-over voting affected the election result. The court is unaware (and plaintiffs offer no evidence) that anyone has ever performed any sort of scientific evaluation of these elections sufficient to establish that deliberate cross-over voting – and not deliberate, personal preference for a candidate – altered the election results. The court declines to find any significant harm in the plaintiffs' (or the court's) anecdotal memory of an Alaskan election.

For its part, the state in essence contends that it will be caused great inconvenience and some significant expense were the court to require it to redesign the 1996 primary election process for the entire state at this late date. In an affidavit, the director of the Division of Elections for the State of Alaska avers that the conduct of the upcoming election will require travel to and training in all of the Alaska election districts for some 2,228 persons who will serve as local election officials. The affiant states that "[m]any of these officials will lack prior experience in the conduct of elections."[16] Particular problems are identified with the training of election officials for the far-flung rural precincts of the state which are managed out of Nome and Fairbanks. The training in these areas for the 1996 primary election was undertaken during May. Training for rural precincts in the Anchorage and Juneau

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[16] Clerk's Docket No. 40, Exhibit 3, p. 2.

regions has also already been accomplished. The training in question took a month and a half to complete.[17]

The foregoing showing is uncontested. The court finds that it would be extremely difficult for the state election officials to retrain primary election officials in the six weeks which remain before the primary election. This is so principally because it would be necessary first to reassemble, reprint, and redistribute handbooks and forms adapted to a two-ballot, rather than a one-ballot, election. The court finds that it is theoretically possible that the election process could be redesigned and implemented by August 27, 1996; but it would take a crash program, and the effort might fail.

The court also finds on the basis of the affidavit of the director of elections that the process of printing ballots, which is currently far advanced, could not be replicated for a two-ballot election such as the plaintiffs seek without a significant risk that some remote election districts would be without ballots on August 27, 1996.

The court finds that a change in the election process at this point might very well disenfranchise as many as 750 overseas voters. *Id.* at 5.

On the basis of the record made by the parties with respect to this motion, the court is not able to find that the balance of hardships tips sharply in the plaintiffs' favor. All of the harm foreseen by the parties is to some degree speculative. The risk of harm to the state is at least as substantial as that to the plaintiffs.

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[17] *Id.*, Exhibit 3, pp. 2-3.

Public Interest

The public interest is an additional factor which the Ninth Circuit Court of Appeals enunciated in *Native Village of Venetie* when setting out the standards for granting or denying preliminary injunctive relief. *Alaska v. Native Village of Venetie*, 856 P.2d 1384, 1389 (9th Cir. 1988).

In this case, the parties differ as to what is sufficiently important to rise to the status of a public concern. Plaintiffs speak of strengthening the party and suggest that the "will of the people" as reflected by state legislation is irrelevant.[18] Also, and while conceding some disruption in the election process if a preliminary injunction were granted, the plaintiffs urge the deprivation of their First Amendment rights to be of far greater public importance than administrative inconvenience. For its part, the state argues that granting an injunction would contravene the will of the people as expressed in the state primary election statute. The state argues, on the basis of this court's earlier decision in *Doyle v. Alaska*, No. A90-0248-CV,[19] that there is "a substantial public interest in having elections conducted timely and in an orderly fashion."[20]

The court has not changed its view of the importance of timely, well-organized elections. What is administrative inconvenience to the state, as set out in the foregoing discussion of harm, poses a serious risk of substantial

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[18] Reply memorandum at 14, Clerk's Docket No. 41.

[19] Order of July 16, 1990, denying preliminary injunction, *Doyle v. Alaska*, No. A90-0248-CV, attached as Exhibit 1 to state's opposition memorandum, Clerk's Docket No. 40.

[20] *Id.* at 19 (citations omitted).

disruption of the orderly primary election processes. If election officials become confused because they have been provided with two sets of materials for the upcoming election, it is in reality the public who will suffer. If ballots are not available at all election precincts on August 27, 1996, then some emergency relief will have to be provided by election officials; and, again, the orderly election process will have been disrupted.

On the peculiar facts of this case, there is another, very serious, public interest consideration. The highest court of the State of Alaska has determined that the state primary election laws should be enforced as is and in preference to Rule 1, Article XIV, of the Rules of the Republican Party of Alaska. State election officials are obligated to follow that decision and have set out to do so. What are the state officials supposed to do if this court now intervenes and enters a conflicting order? Does the more recent order carry the day? What if the state succeeds in obtaining from the Alaska Supreme Court some sort of "reaffirmation" of its decision subsequent to an order issued by this court? Does a federal court order on a federal constitutional issue take precedence over a state court order on the same issue?

There may very well be cogent answers to these questions, but it would be unseemly for election officials to be caught in such a cross-fire a scant six weeks before a primary election is to be held. At a time when the public view of government in general is (to say the least) jaded, this court deems it not to be in the public interest for its to put the state into a position where it is subject to absolutely conflicting orders from two different courts except for the most compelling of reasons.

Blanket primaries were conducted in this state for almost thirty years. The court at this juncture believes that the Republican Party of Alaska has a constitutional right to change its mind about the efficacy of a blanket primary, as it did by enacting Rule 1. The efficacy of that rule has been litigated, and the Republican Party lost. The Republican Party has a potential remedy in the United States Supreme Court, and it is actively pursuing that remedy at this time. This court declines to create a confrontation at a point in time so near the primary election as to make it difficult for either party to comply or seek other effective relief.

The court declines to consider ordering a Republican Party mail ballot. Such procedure does not comport with either AS 15.25.010, *et seq.*, or the state law expressly dealing with voting by mail. AS 15.20.800. Moreover, plaintiffs have not yet obtained a pre-clearance decision from the Voting Section of the Department of Justice. Absent such a decision, action by this court would be premature. *See* authorities discussion in Order of July 14, 1990, *Doyle v. Alaska*, No. A90-0248-CV.[21]

The motion for preliminary injunction is denied.

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[21] Clerk's Docket No. 40, Exhibit 1, pp. 10-12.

DATED at Anchorage, Alaska, this 17 day of July, 1996.

/s/ H. Russel Holland
H. Russel Holland, Judge
District of Alaska

IMMEDIATE NOTIFICATION
IS REQUESTED

A95-0053-CV (HRH)

K. JACOBUS
J. GAGUINE (AAG-JUNEAU)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

WAYNE ANTHONY ROSS, et al., Plaintiffs,	)	No. A95-0053-CV (HRH)
vs.	)	
STATE OF ALASKA, et al., Defendants,	)	

ORDER

(Filed Jul. 31, 1996)

Motion for Partial Summary Judgment

Plaintiffs move for partial summary judgment[1] as regards Article XIV, Section 5 (candidate requirements), Rules of the Republican Party. The motion is opposed. Oral argument has been requested, but is not deemed appropriate at this time.

The motion for partial summary judgment is denied, not because the court is of the view that the motion lacks merit, but because the court shares the view of the defendants that this motion is in a very real sense premature. The court's reason for this conclusion is not the same as that of the State of Alaska, however.

The court has not yet decided whether the plaintiffs' associational rights which are at issue in this case are to

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[1] Clerk's Docket No. 28.

be subject to a strict scrutiny analysis, or whether some less demanding test will apply. The court has of course given the parties a glimpse of its view of this matter, but it is an important issue that must ultimately be decided in the course of a decision on the merits of the plaintiffs' claims with respect to the state law blanket primary requirement. The court does not desire to take a final position on that issue in the course of the instant motion. Moreover, if the state were right that this case should call into play not strict scrutiny of plaintiffs' rights but a balancing test of plaintiffs' interests versus defendants' interests, then whether or not the statutory blanket primary survives constitutional scrutiny in federal court could affect the balance and/or the need for the particular Republican Party candidate requirement rule which is at issue here. In other words, if Democrats cannot vote in the Republican primary, concern over divisive primary candidate filings may be very different.

The motion for partial summary judgment is denied with leave to renew that motion summarily in association with motion practice which the court anticipates with regard to the merits of the blanket primary dispute between the parties. In this regard, it is the court's intention that a status conference be convened in this case at a time convenient to the parties and the court during the month of September 1996.

DATED at Anchorage, Alaska, this 31 day of July, 1996.

/s/ H. Russel Holland,
H. Russel Holland, Judge
District of Alaska

A95-0053-CV (HRH)

K. JACOBUS✓
J. GAGUINE (AAG-JUNEAU)

U.S. Department of Justice

[SEAL]

Civil Rights Division

Voting Section
P.O. Box 66128
Washington, D.C. 20035-6128

DLP:RAK:HEW:tlb
DJ 166-012-3
96-2515

July 30, 1996

Kenneth P. Jacobus, Esq.
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Dear Mr. Jacobus:

This refers to the procedures for a 1996 mail-in primary election for the Republican Party of Alaska in the State of Alaska, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on May 31, 1996; supplemental information was received on July 11 and 18, 1996.

Our analysis indicates that the information sent is insufficient to enable us to determine that the proposed change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language

minority group, as required under Section 5. The following information is necessary so that we may complete or review of your submission:

1. Copies of all minutes, resolutions or other documents that show the proposed change to have been finally adopted by the Republican Party of Alaska.

2. Copies of all petitions for *certiorari*, briefs, applications for stay, motions or other pleadings filed with the United States Supreme Court with regard to the appeal of *O'Callaghan v. State of Alaska*, 914 P.2d 1250 (Alaska 1996). Describe the present status of that case before the Supreme Court.

3. A detailed, chronological description of the process leading to the adoption of the proposed mail-in primary procedures. Identify all meetings or discussions, whether formal or informal, concerning the proposed change. Identify any minority input regarding the proposed change or any alternative provision, including the name and daytime telephone number of any minority person or organization commenting on the proposed change, the substance of the comments or suggestions, and the action taken in response.

4. A description of all publicity regarding the proposed mail-in primary, including public notices, notices to voters, television or radio notices, newspaper articles, editorials or letters to the editor.

5. Under existing election procedures voters may change their party affiliation on the day of the primary at their polling place. Discuss whether this will be possible under the proposed mail-in voting procedures.

6. An explanation of what procedures, if any, the Republican Party of Alaska proposes to employ in order to conduct the proposed mail-in primary in accordance with the requirements of Sections 4(f) (4) and 203 of the Voting Rights Act, 42 U.S.C. 1973b(f) (4) and 1973aa-1a. Include a detailed description of any procedures designed to make minority language assistance available to voters who presently obtain such assistance at their polling places on election day.

In addition, please discuss the legal authority for the Republican Party of Alaska to adopt mail-in primary election procedures. We note that the Attorney General has precleared a submission by the State of Alaska to conduct the 1996 primary election under the state "blanket primary" law, pursuant to the decision of the Alaska Supreme Court in *O'Callaghan v. State of Alaska,* and that the United States Supreme Court has denied two applications for a stay of the *O'Callaghan* decision. We note further that the Republican Party of Alaska's motion for preliminary relief, including a request for court-ordered implementation of the mail-in primary, was denied by the United States District Court for the District of Alaska in *Ross v. State of Alaska,* No. A95-0053-CV (Mem. Op. July 17, 1996). To the extent that the proposed change relies upon court-ordered implementation, please discuss the effect of the identified decisions.

The Attorney General has sixty days to consider a completed submission pursuant to Section 5. This sixty-day review period will begin when we receive the information specified above. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.37). However, if no response is received within sixty days of this request,

the Attorney General may object to the proposed change consistent with the burden of proof placed upon the submitting authority. See also 28 C.F.R. 51.40 and 51.52(a) and (c). Changes which affect voting are legally unenforceable unless Section 5 preclearance has been obtained. *Clark v. Roemer,* 500 U.S. 646 (1991); 28 C.F.R. 51.10. Therefore, please inform us of the action the Republican Party of Alaska plans to take to comply with this request.

If you have any questions concerning this letter or if we can assist you in obtaining the requested information, you should call Ms. Hallue Wright (202-307-6261) of our staff. Refer to File No. 96-2515 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

Deval L. Patrick
Assistant Attorney General
Civil Rights Division

By: /s/ Elizabeth Johnson
Elizabeth Johnson
Acting Chief,
Voting Section